

## BABES AND BEEFCAKE: EXCLUSIVE HIRING ARRANGEMENTS AND SEXY DRESS CODES

ANN C. MCGINLEY\*

### I. INTRODUCTION: EXCLUSIVE HIRING, BFOQS, AND SEX-SPECIFIC DRESS CODES

Las Vegas casinos exclusively hire women to serve cocktails on the casino floor, dressing them in tight-fitting, sexy, uncomfortable costumes and high heels. The exclusive hiring of women as cocktail servers violates Title VII's prohibition against sex discrimination unless the employer can demonstrate that being a woman is a bona fide occupational qualification<sup>1</sup> ("BFOQ") for the job of cocktail server.<sup>2</sup>

The courts interpret the BFOQ defense very narrowly.<sup>3</sup> In *Int'l Union v. Johnson Controls, Inc.*, the Supreme Court held that an employer will prevail using the BFOQ defense only if sex or the sex-differentiated job qualification relates to the "essence" or the "central mission" of the employer's business and is objectively and verifiably necessary to the employee's performance of job tasks and responsibilities.<sup>4</sup>

While courts, scholars, and the Equal Employment Opportunity Commission (EEOC) consistently interpret Title VII to forbid employers from

\* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, J.D., University of Pennsylvania, 1982. My appreciation goes to Deans Richard Morgan and Joan Howarth for their support, and Bill Boyd and Jim Rogers for providing financial support for this project. I also thank Jeff Stempel and Elaine Shoben for their comments. Finally, I thank Deanna Brinkerhoff, who provided excellent research support, and Diana Gleason, Matthew Wright, and Bobbie Studwell of the Weiner-Rogers Law Library of the Boyd School of Law.

1. The statute provides that it is not an unlawful employment practice for "an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2000).

2. It is possible that a casino employer would argue that only women applied for the job and therefore the casino is not discriminating against men because of sex when they hire women cocktail servers. Nonetheless, if a casino made this argument in response to a lawsuit, plaintiff might be able to point to the "inexorable zero"—the number of men working in the position of cocktail server. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342, n.23 (1977) (noting that the company could not rebut the inference of race discrimination because of the "inexorable zero"—the total absence of minorities in line driver jobs). Depending on the facts and the court's orientation, a plausible pattern and practice case might exist against a casino. 42 U.S.C. § 2000e-6(a).

3. See, e.g., *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

4. *Johnson Controls*, 499 U.S. at 201.

using customer preference as a defense to illegal discrimination,<sup>5</sup> they recognize the defense to protect consumer preferences in three situations. First, some courts permit defendants to use the BFOQ defense in health care or prison situations where the patient or inmate's fundamental right to personal privacy or safety is at stake.<sup>6</sup> Second, while courts do not recognize a BFOQ defense for employers hiring women for sex appeal,<sup>7</sup> Dean Katharine Bartlett concludes that sex should be a BFOQ if the central mission of the employer's business is to sell sex or sexual entertainment.<sup>8</sup> Finally, the EEOC concludes that sex may be a BFOQ to guarantee authenticity in a dramatic production.<sup>9</sup>

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5. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (holding that stereotyped customer preferences do not justify sexually discriminatory practices); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that the airline violated Title VII by refusing to hire male flight attendants even though customers preferred women for the job); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1069 (D. Ariz. 1999) (holding that the employer could not refuse to hire male massage therapists even though women customers preferred women).

6. See *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 761 (6th Cir. 2004) (upholding the prison's BFOQ defense for hiring females only for certain positions in female prisons based on a documented history of sexual abuse and assaults of the female prisoners by male prison guards); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996) (upholding BFOQ defense of children's psychiatric hospital which transferred the female plaintiff, a child care specialist, to the night shift in order to assure there was at least one woman on every shift because child patients were victims of sex abuse); *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp 376, 387 (S.D.N.Y. 1992) (concluding that there is a BFOQ that at least one person working in a mental health facility as a Security Hospital Treatment Assistant be a woman to protect the privacy and security of women patients).

7. See, e.g., *Diaz*, 442 F.2d at 385 (holding that defendant could not limit its flight attendant positions to women because customers preferred women's sex appeal); *Wilson v. Sw Airlines, Inc.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (holding that sex appeal of women flight attendants was not a BFOQ for the job).

8. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2577 (1994).

9. 29 C.F.R. § 1604.2 (2003) states:

- (a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.
  - (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
    - (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
    - (ii) The refusal to hire an individual based on stereotyped characterization of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
    - (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.
  - (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

These exceptions are narrow and may or may not reasonably exclude casino operators from claiming a BFOQ defense for hiring women exclusively as cocktail waitresses. Although casinos may have difficulty proving that the essence of their business is to sell sex, the EEOC's recognition of authenticity may support a casino's BFOQ defense. Casinos will argue that the essence of their business is entertainment and that young female cocktail servers dressed in sexy garb represent the epitome of what a Las Vegas casino is: a glamorous illusion. The casino's brand identity, the argument goes, is closely related to the appearance and dress of the cocktail servers, and hiring attractive women and dressing them in sexy uniforms is related to the essence of the entertainment business.

Strict appearance and dress codes governing cocktail servers' uniforms are closely related to, but not determinative of, the question of whether Title VII permits casinos to hire women exclusively to serve cocktails on the casino floors. Without the appearance codes and uniforms required of cocktail servers, the casinos' argument that cocktail servers must be women would necessarily fail. It is not merely women, but women with a particular appearance, that casinos hire as cocktail servers. In most casinos, cocktail servers are young, shapely, smiling, and thin. The form-fitting uniforms enhance their sexuality and the illusion that the cocktail server exists merely to please the male casino customer.

Sitting en banc, the Ninth Circuit Court of Appeals recently decided *Jespersen v. Harrah's Operating Co.*,<sup>10</sup> an appearance code case that may have significant repercussions in Nevada casinos and other similar establishments. In *Jespersen*, Harrah's Casino in Reno, Nevada fired the plaintiff, a female bartender, for refusing to wear makeup. The Ninth Circuit concluded that sex-differentiated appearance and grooming codes are legal in jobs held by both men and women unless they impose unequal burdens on men and women.<sup>11</sup> The Ninth Circuit, however, added an interesting twist. It concluded that a plaintiff may attack a dress and grooming code under *Price Waterhouse v. Hopkins*<sup>12</sup> if the code intentionally stereotypes women because of their sex and the stereotyping objectively interferes with the woman's ability to perform the job.<sup>13</sup>

Undoubtedly, the uniforms worn by women cocktail servers intentionally stereotype them because of their sex. After *Jespersen*, a casino would have to prove, in response to a lawsuit challenging its dress code, that it is a BFOQ for a woman cocktail server to dress in a sexy uniform. Assuming that the courts would conclude that being a woman who dresses in sexy garb is not a BFOQ for the position of cocktail server, *Jespersen* raises the question of whether the

10. 444 F.3d 1104 (9th Cir. 2006) (en banc).

11. *Id.* at 1109–10.

12. 490 U.S. 228 (1989) (plurality opinion). In *Price Waterhouse*, Ann Hopkins challenged her employer's failure to make her a partner in the large accounting firm. The Supreme Court concluded that discrimination based on Hopkins' failure to conform to stereotyped expectations of the proper dress and behavior for women was discrimination because of sex. *Id.* at 255–56.

13. *Jespersen*, 444 F.3d at 1111–12 (en banc).

casinos may legally hire both men and women, and dress both in sexy costumes, which in essence, sexually stereotypes both men and women.<sup>14</sup>

This article examines the strengths and weaknesses of potential legal and policy arguments concerning whether being a woman dressed in a sexy uniform is a BFOQ for the job of casino cocktail server. Concluding that being a woman should not be a BFOQ for the job, this article addresses whether casino owners may require that women and men cocktail servers wear sexy provocative uniforms to serve cocktails in Las Vegas casinos.

Part II briefly describes a “typical” cocktail waitress in Las Vegas. Part III analyzes courts’ and scholars’ interpretations of the proper scope of the BFOQ defense. Part IV explores both current interpretations and policy considerations concerning application of the BFOQ defense to Nevada casinos that argue that being a sexy, young woman is a BFOQ for the job of cocktail server. Part V addresses whether *Jespersen* permits casino owners to dress both women and men cocktail servers in sexually provocative clothing. It asks whether the unequal burdens test would apply to men and women whose jobs require them to wear sexually stereotyping clothing and, if so, how the courts should decide whether particular sexy clothing places an unequal burden on men or women.

Finally, this article concludes that being a woman should not be a BFOQ for the job of cocktail server, but that *Jespersen* should permit casinos hiring cocktail servers and other similar employers whose jobs include an aspect of performance to require that both men and women wear sexually provocative uniforms to work. This conclusion should apply, however, only in those jobs where the employer legitimately sells entertainment and the job itself involves performance. For industries other than those promoting entertainment and jobs that do not involve performance, requiring men and women to perform their sex at work may cause harm to their sense of identity and intrude upon their privacy interests.<sup>15</sup>

## II. A COCKTAIL SERVER’S JOB<sup>16</sup>

*The scantily clad young woman maneuvers through the crowded smoky room, carrying a tray full of drinks. She wears high heels, long black stockings, a tight-fitting bustier, and short-shorts, a costume that displays her long legs and ample breasts. Her*

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14. A threshold question exists: whether *Jespersen* rightfully decided that the burdens test applies to jobs held by both men and women and if so, how to apply that test. For an interesting argument that sex-differentiated grooming codes violate Title VII, see David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 244–45 (2004), arguing that the BFOQ defense applies only to hiring and firing and not to conditions of employment.

15. For an interesting discussion concerning the privacy interests of employees in the dress and grooming at work, see generally Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006). See also Carrie Yang Costello, *Changing Clothes: Gender Inequality and Professional Socialization*, 16 NWSA J. 138 (June 2004) (concluding that attempting to comport with professional dress requirements can lead to “identity dissonance”—“the disconcerting internal experience of conflict between irreconcilable aspects of their self-concepts”).

16. The following description is of a fictitious cocktail server. However, the conditions and attitudes described are real composites of information I have learned from observation and interviews with cocktail servers and other casino or former casino employees.

hair is fixed and her nails are painted a light pink. She wears carefully-applied foundation, eye liner and shadow, lipstick, and blush. Although her arms are bare and the room is very cold, she does not wear a sweater. She always wears a smile as she walks from table to table serving the patrons in the Las Vegas casino. While some would consider her look an anachronism, others believe that she looks glamorous, sexy, and willing to serve; she exudes the aura of a person who has no problems of her own. She is part of the illusion that Las Vegas sells to its customers. There are no problems in Las Vegas: Everyone is here to serve the customer.

Before we see her on the casino floor, the cocktail server, who is a single mother, picked up her two children from school, quickly cooked them dinner and got them started on their homework. She spent an hour putting on makeup and fixing her hair before leaving for the casino. Once at the casino, she picked up her uniform from the casino dry cleaners and dashed to the locker room to dress for the evening. In the locker room, she dressed in her required clothing, even down to the regulation push-up bra. Last year she underwent breast augmentation surgery. Her employer offered to pay for it, and she finds that her tips are better now that her cleavage is deeper and her breasts firmer. She hastened to attend a required fifteen minute roll-call meeting at the casino when her supervisor inspected her uniform to ensure that her appearance followed the strict regulations of the casino. Had she not worn her hair properly, or had she worn flat shoes, her supervisor may have docked her points or sent her home. Had she worn a sweater, her supervisor would have reminded her to remove it before she went onto the casino floor, despite the frigid temperatures.

Now the cocktail server is on the floor serving customers. She makes a considerable income, the vast majority from tips, and is relatively happy with her lot. She works at one of the "high-end" casinos that attract a wealthier clientele and she feels somewhat superior to the "girls" who work at the "low-end" casinos. She has heard rumors that at some of those casinos the management requires cocktail servers to sign agreements that they will be weighed monthly. If they gain more than six pounds, they will be laid off until they lose the weight. At least she does not have to put up with that treatment!

At 32 years old, she knows that this job will not last forever; if she keeps in shape, she may be able to last until she hits 38 or 40. She knows a number of women who are serving cocktails at other casinos who are well into their 40's. But she is not sure how much longer she has at the job because the casinos are increasingly hiring younger women to serve cocktails. She also knows that a neighboring high-end casino replaced its older cocktail waitresses a few years ago with "bevertainers". The concept was that the women would dance as they served cocktails. The casino eliminated some cocktail server jobs and held auditions for the new servers. Those who auditioned for the job were younger and many had aspirations to model or act. Some believed that the casino introduced the bevertainer concept not only to rid itself of the older women who served cocktails, but also to change the cocktail server position from union to non-union.

She isn't sure how she feels about union representation because she works in a non-union shop. Most of the cocktail servers in town are represented by the Culinary Workers Union, but there are a few casinos that do not have union representation.<sup>17</sup>

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17. While the influence of labor unions is declining nationally, membership in labor unions is increasing in Nevada. The Culinary Workers Union, which represents service employees working in many of the Nevada casinos, experienced a 20% increase in membership in 2005, while overall union

*Although she does not see much of a difference in working conditions for cocktail servers where the unions exist, she believes that the union might be more protective of job security and longevity.*

*She knows that there are no men serving cocktails on the floors of any of the casinos. Her view is that no man would want the job. When asked whether men should be hired for the job, she thinks it would be impossible—what would they wear? This is a woman's job, and, anyway, she makes more in tips than the bartenders and bar backs who stock the bars, who are mostly men. It is true that the casino is loud and smoky, and that her feet ache at the end of the day. The clients are often fresh and occasionally harass her, but in most casinos there is good security. If a client really acts up she knows she can have him bounced, unless perhaps he is a high roller. High rollers get special treatment and it is more difficult to have them evicted.<sup>18</sup> She knows of a number of women who developed hip problems from carrying the heavy trays on one side. Even she, who is relatively healthy, has her spine adjusted regularly by a chiropractor.*

*One thing does bother her a little. Each casino has employees who act as hosts to the high rollers. The hosts arrange dinner and show reservations for guests, and generally serve as resources to the high-betting patrons. Because the vast majority of high rollers are men, the casinos exclusively hire men to fill the role of casino host. She might be interested in acting as a casino host because they make more money than she does. Moreover, in some of the high roller rooms, casino hosts, rather than cocktail waitresses, serve drinks to the high roller customers. The hosts may be cutting into her tips, but she has no way to become a host. She understands that being a host is a man's job, particularly because the hosts go with the high rollers to the strip clubs.*

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Nevada casinos openly and self-consciously sell sexual appeal by limiting cocktail serving jobs to women dressed in alluring outfits. While they do not advertise the jobs as exclusively for women, they hire women exclusively as cocktail servers and men exclusively as casino hosts.<sup>19</sup> The market is well-established, and locals accept these hiring practices as the natural order of things. Like our fictitious cocktail server, locals cannot imagine a man serving cocktails. What would he possibly wear? What man would want that job? Remarkably, while cocktail servers have challenged the high heel requirement and the differential treatment of pregnant women who serve cocktails, it appears that no man has ever challenged the casinos for failing to hire him as a cocktail server. In fact, men do not apply for these jobs.<sup>20</sup> However, men do serve

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membership grew from 12.5% to 13.8% of the working population between 2004 and July 2006. See J. Patrick Coolican, *Reid Puts Nevada In '08 Spotlight*, LAS VEGAS SUN, July 23, 2006, at 1.

18. See Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. (forthcoming).

19. At a recent symposium at Duke Law School on "Makeup, Identity Performance & Discrimination" (October 20, 2006), Paul Ades, the Associate General Counsel for Harrah's Entertainment, Inc., stated that Harrah's does hire both men and women to serve cocktails. He also stated that it dressed both men and women in clothing that the casino considers sexy, but he declined to describe what the men wear.

20. A high-ranking woman in the management of a casino in Laughlin, Nevada, once told me that she keeps a uniform for a man cocktail server in case a man applies for the job so that her company is not accused of discrimination against men. However, no man had ever applied.

cocktails at the pools of some casinos. One cocktail server explained that men are permitted at the pool but not on the casino floor because the inside of the casino is more “formal” and the pool is more “informal.”<sup>21</sup>

Las Vegas casinos are extremely concerned about the proper “look” of their casinos and employees. The majority of casino employees wear uniforms which vary in style and color with the job. The concept is that a visitor can distinguish one type of employee from another by his or her uniform.<sup>22</sup> In jobs that are occupied by men and women the uniforms are almost identical. For example, in many casinos, men and women blackjack dealers wear similar attire. Even when the uniforms are similar in jobs occupied by both men and women, the casino may have different grooming and makeup codes.<sup>23</sup> The casino “look” reinforces traditional notions of the roles of men and women.

Unlike the traditional look of other casino employees, the look of the cocktail server is, in some ways, contradictory. The idea that women are sexual objects who serve men with a smile conforms with and runs counter to traditional notions because it simultaneously views two separate aspects of women that should not exist within the same woman. The cocktail waitress is both a “good girl”—an uncomplaining servant to the man—and a “bad girl”—an object of sexual gratification.<sup>24</sup> The job requires women to perform two somewhat contradictory aspects of female gender simultaneously. She performs “good girl” submissive gendered behavior while simultaneously performing “bad girl” sexual flirtation. The job, therefore, requires *two* types of gender performance by the cocktail server. Challenging the exclusive hiring of sexy women as cocktail servers questions whether Title VII should be manipulated to assign women exclusively to roles of servile, sexy beings.

### III. BACKGROUND: BFOQS IN TITLE VII JURISPRUDENCE

#### A. BFOQ Jurisprudence

Since the BFOQ defense shields an employer from liability for overt intentional discrimination and runs contrary to the purpose of Title VII, courts consistently have held that the defense is extremely narrow.<sup>25</sup> By its terms, the BFOQ defense does not absolve an employer from race- or color-based discrimination. A Las Vegas casino, therefore, would have no defense based on the statutory text if it decided to open a Southern plantation-style casino with Black

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21. Interview with former cocktail server, in Las Vegas, Nev. (May 17, 2006).

22. Interview with former wedding planner, at the MGM Grand Hotel and Casino in Las Vegas, Nev. (June 3, 2006).

23. See *Jespersen*, 444 F. 3d at 1106–07.

24. For a description of the “good girl/bad girl” dichotomy, see Deborah L. Tolman & Tracy E. Higgins, *How Being a Good Girl Can be Bad for Girls*, in “BAD GIRLS” / “GOOD GIRLS”: WOMEN, SEX, AND POWER IN THE NINETIES 205 (Nan Bauer Maglin & Donna Marie Perry eds., 1996). See also Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 87–88 (2006) (describing the “good girl” and “bad girl” behavior of cocktail waitresses).

25. See, e.g., *Johnson Controls*, 499 U.S. at 201 (stating that the BFOQ defense should be applied narrowly); *Diaz*, 442 F.2d at 389 (5th Cir.) (holding that female gender is not a BFOQ for a flight attendant), *cert. denied*, 404 U.S. 950 (1971); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983) (holding that establishing the defense presents an employer with a “heavy burden”).

waiters.<sup>26</sup> Title VII, however, does permit an employer to prove that sex, national origin, or religion<sup>27</sup> is reasonably necessary to the normal operation of the employer's business.

The Supreme Court first interpreted Title VII's BFOQ defense in *Dothard v. Rawlinson*.<sup>28</sup> The plaintiffs, a class of women prison guards, were prohibited by regulation from serving in maximum-security male prisons in Alabama.<sup>29</sup> While emphasizing the narrowness of the BFOQ defense,<sup>30</sup> the Court agreed that being male was a BFOQ for the job of prison guard in the exclusively male maximum-security prisons in Alabama.<sup>31</sup> The Court concluded that protecting women from violence was not a valid justification for the defense,<sup>32</sup> but accepted the defense because of the "peculiarly inhospitable" conditions at the Alabama state prisons which included a "jungle atmosphere" and "rampant violence."<sup>33</sup>

The Court stated that the "very womanhood" of the women prison guards would alter their ability to do the job of maintaining security in the prison because there was a risk that the convicted sex offenders and other inmates would assault the women guards.<sup>34</sup> Although the Court's concept of women as temptresses seems anachronistic, the Court made clear that the BFOQ was not designed to protect women but to maintain security in the prisons.

In *Johnson Controls*,<sup>35</sup> a class of plaintiffs sued its employer, a battery manufacturer, because its fetal-protection policy excluded fertile women—but not fertile men—from jobs that exposed them to lead.<sup>36</sup> The fetal-protection policy defined all women as fertile unless they had medical documentation establishing their infertility.<sup>37</sup> The employer argued that adhering to the policy was a BFOQ because studies demonstrated that lead exposure could injure unborn children.<sup>38</sup> The Supreme Court rejected *Johnson Controls*' argument, stressing that the BFOQ defense should be applied sparingly. It noted:

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits

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26. For a discussion of the possibility of a common law BFOQ for race, see generally Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ*, 35 U.S.F. L. REV. 473 (2001).

27. The Age Discrimination in Employment Act (ADEA), which prohibits discrimination against persons over 40 years old due to their age, also grants a BFOQ defense to employers. 29 U.S.C. § 623(f)(1) (2000).

28. 433 U.S. 321 (1977).

29. *Id.*

30. *Id.* at 333.

31. *Id.* at 334–37.

32. *Id.* at 335.

33. *Id.* at 334–35 (quoting *Pugh v. Locke*, 406 F. Supp. 318, 325 (M.D. Ala. 1976)). Unlike well-run state prisons, the Alabama prisons had inadequate staff and facilities and did not segregate the prisoners according to the dangerousness of their offenses. About ten percent of the prisoners were convicted sex offenders who lived in the dormitories with the other inmates. *Id.* at 336.

34. *Dothard*, 433 U.S. at 334–36 (1977).

35. 499 U.S. 187 (1999).

36. *Id.* at 192.

37. *Id.*

38. *Id.* at 198.



the situations in which discrimination is permissible to ‘certain instances’ where sex discrimination is ‘reasonably necessary’ to the ‘normal operation’ of the ‘particular’ business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is ‘occupational’; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.<sup>39</sup>

The Court emphasized that the employer did not have total discretion to define its business to fit the BFOQ defense:

Justice White defines ‘occupational’ as meaning related to a job. According to him, any discriminatory requirement imposed by an employer is ‘job-related’ simply because the employer has chosen to make the requirement a condition of employment. In effect, he argues that sterility may be an occupational qualification for women because Johnson Controls has chosen to require it. This reading of ‘occupational’ renders the word mere surplusage. ‘Qualification’ by itself would encompass an employer’s idiosyncratic requirements. By modifying ‘qualification’ with ‘occupational,’ Congress narrowed the term to qualifications that affect an employee’s ability to do the job.<sup>40</sup>

Moreover, the Court repeated that *Dothard v. Rawlinson* upheld the defense in order to avoid injury to the employer’s business objectives, which included the maintenance of prison security. The presence of women, in that case, would likely have caused a breach in security and therefore, would hinder the women’s ability to do the job.<sup>41</sup> No such situation existed at Johnson Controls. A woman’s fertility had no relationship to her ability to perform the tasks required in a battery manufacturing plant. Therefore, because fertility was not related to the essence of the business and because it did not affect the women’s ability to perform the job, it was not a BFOQ.<sup>42</sup>

After *Johnson Controls*, an employer must prove that its BFOQ defense is based on objective fact and that the sex or sex-differentiated job qualification relates to the “essence” or the “central mission” of the employer’s business and is objectively and verifiably necessary to the employee’s performance of job tasks and responsibilities.<sup>43</sup>

## B. Privacy and BFOQs

The Supreme Court has never decided whether privacy is a proper justification for a BFOQ, but it has suggested that privacy may support a

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39. *Id.* at 201. Furthermore, the Court concluded that the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), made clear that discrimination on the basis of one’s ability to become pregnant or on the basis of one’s pregnancy is sex discrimination. *Id.* at 204–05. The Act states, the Court explained, that pregnant women must be treated the same as other employees with regard to their ability or inability to work. *Id.*

40. *Id.* at 201.

41. *Johnson Controls*, 499 U.S. at 202.

42. *Id.* at 206.

43. *Id.* at 187.

BFOQ.<sup>44</sup> Some lower courts recognize a BFOQ defense where the employer argues that exclusive hiring of men or women for a particular job protects the privacy interests of patients, customers, or inmates.<sup>45</sup> Kimberly Yuracko has demonstrated that courts are more likely to find a BFOQ in order to protect the privacy interest of the consumer than in cases in which the employer hires exclusively women to use sex appeal to sell a product or service.<sup>46</sup>

While some of these cases stress the employer's economic interest in protecting the privacy of its consumers, the more compelling cases deal with privacy of inmates and patients who either have been victims of sexual abuse or are vulnerable to sexual assault.<sup>47</sup>

## C. Sex, Authenticity and BFOQs

### 1. *Selling Sex, Sex Appeal, and BFOQs*

While courts are generally more lenient in finding BFOQs when the employer asserts consumer privacy as a justification,<sup>48</sup> courts judge an employer's BFOQ defense more harshly when the employer hires women or

44. In a footnote in *Johnson Controls*, the Court refused to reach the question of whether patient or client privacy would ever justify a BFOQ defense in a sex discrimination case, but it implied that the Court may possibly uphold privacy as a justification for a BFOQ using the "essence of the business test." *Id.* at 206 n.4.

45. See *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1422 (N.D. Ill. 1984) (upholding BFOQ to protect privacy interests of men in men's wash rooms); *Backus v. Baptist Medical Ctr.*, 510 F. Supp 1191, 1192-93 (E.D. Ark. 1981) (holding that hospital made out a BFOQ defense for its policy of assigning only female nurses to the obstetrical care unit because of the need to protect patients' dignity and privacy), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982). But see *Torres v. Wis. Dep't of Health and Soc. Servs.*, 859 F.2d 1523 (7th Cir. 1988) (stating that BFOQ defense may be possible in a women's correctional facility that hired no men for certain positions but rejecting the security and privacy rationales for the defense and remanding to the lower court to consider rehabilitation as a justification for the defense); *Griffin v. Mich. Dep't of Corr.*, 654 F. Supp. 690, 703 (E.D. Mich. 1982) (rejecting the defendant prison's BFOQ defense in a maximum security male prison, and concluding that male inmates do not possess any protected right under the Constitution against being viewed while naked by correction officers of the opposite sex).

46. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 151-53 (2004).

47. See *Everson*, 391 F.3d at 737 (upholding the prison's BFOQ defense for hiring females only for certain positions in female prisons based on the documented history of sexual abuse and assaults of the female prisoners by male prison guards); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (upholding BFOQ defense of children's psychiatric hospital which transferred the female plaintiff, a child care specialist, to the night shift in order to assure there was at least one woman on every shift because child patients are victims of sex abuse); *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp 376 (S.D.N.Y. 1992) (concluding that there is a BFOQ that at least one person working in a mental health facility as a Security Hospital Treatment Assistant be a woman to protect the privacy and security of women patients). But cf. *Torres*, 859 F.2d at 1530, 1533 (7th Cir. 1988) (holding that under the circumstances particular to this case privacy of women prisoners is not sufficient reason for BFOQ defense in hiring only women guards, but stating that business purpose of rehabilitation may be sufficient for a BFOQ); *Griffin*, 654 F. Supp. at 704 (E.D. Mich. 1982) (distinguishing *Dothard* and holding that it is not a BFOQ to hire only men guards in male maximum security prison because there was no evidence of mismanagement, rampant violence, or of a jungle-like atmosphere).

48. See Yuracko, *supra* note 46, at 151-53.

men exclusively to use sex appeal to sell unrelated goods and services.<sup>49</sup> In *Diaz v. Pan Am. World Airways, Inc.*,<sup>50</sup> for example, the defendant asserted a BFOQ defense for refusing to hire male flight attendants because customers preferred women as flight attendants. The Fifth Circuit rejected the defense because the primary function of an airline is safe transportation; excluding men from becoming flight attendants did not further this function.<sup>51</sup>

Likewise, in *Wilson v. Southwest Airlines*,<sup>52</sup> Southwest Airlines offered a BFOQ defense for limiting flight attendant and ticket agent positions to women. Southwest argued that hiring women was necessary to its advertising campaign and new sexy, young image.<sup>53</sup> The court rejected the defendant's BFOQ defense because a man can perform the job of a flight attendant and ticket agent, the sex appeal portion of the job was tangential to its essential duties, and the company could not prove that it would go out of business if it hired men for those positions.<sup>54</sup> The court concluded that the BFOQ defense is not applicable if sex is used to promote a business that is unrelated to sex.<sup>55</sup> It stated, "[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool or to better ensure profitability."<sup>56</sup>

Dean Bartlett agrees with *Diaz* and *Wilson* and argues that a business whose "essence" is selling sex may have a BFOQ defense for hiring a woman into a specific job that requires female sex or sex-based characteristics.<sup>57</sup> Under this view, a strip club may employ the BFOQ defense when challenged for hiring exclusively women as exotic dancers if the essence of its business is to provide entertainment to heterosexual men,<sup>58</sup> but airlines and restaurants may

49. See, e.g., *Diaz*, 442 F.2d at 385; *Wilson*, 517 F. Supp. at 292; Yuracko, *supra* note 46, at 196–98. Yuracko notes that the courts draw a sharp distinction between businesses that hire women to sell sex and businesses that use sex appeal to sell another product or service, a distinction that is recommended by Bartlett. See Yuracko, *supra* note 46, at 151–53. While Professor Yuracko agrees that customer privacy is a better justification than sexual titillation, she finds the courts' explanation of its reasons for its line-drawing inadequate. Yuracko posits that a preferable explanation for the courts' recognition of a privacy BFOQ is perfectionism that recognizes privacy as a negative right. In other words, courts do not demand that a person be private or receive privacy, but once the person claims a privacy right, the courts will permit the consumer his or her privacy preference even if it is not logical.

50. 442 F.2d 385, 387–88 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

51. *Id.* at 388.

52. 517 F. Supp. 292 (N.D. Tex. 1981).

53. *Id.* at 293.

54. *Id.* at 302.

55. *Id.* at 304.

56. *Id.* at 303.

57. See Bartlett, *supra* note 8, at 2575–76.

58. Although Kimberly Yuracko disagrees that the "essence of the business" test justifies the results espoused by Bartlett and followed generally by the courts, Yuracko argues that courts properly refuse to grant a BFOQ to businesses that use sex appeal to sell other services. See Yuracko, *supra* note 46, at 201–02. The four possible definitions of "essence" she examines are: 1) "inherent theory of essences"; 2) "shared meaning of essences"; 3) "employer-defined meaning of essences"; and 4) "customer-defined theory of essences." *Id.* at 161–67. Yuracko posits that the courts' refusal to permit employers to use sex appeal as a BFOQ to sell other services serves the policies of Title VII by permitting women workers to flourish in environments that value their intellectual capacities and do not judge them as sex symbols. *Id.* at 202. According to Yuracko, worker-focused perfectionism has

not use the defense if they attempt to attract customers by hiring exclusively women.<sup>59</sup> Dean Bartlett makes this argument forcefully with reference to the lawsuits against Hooters,<sup>60</sup> a restaurant chain that hires only female waitresses who wear sexually provocative clothing. She explains that employers may not use the BFOQ defense to sexual subordination of women in order to gain a competitive advantage:

Hooters should be required to show that the sex distinctions at issue are so essential to its business that without them it could no longer provide the primary product or service it intends, lawfully, to provide. Following *Diaz* and *Wilson*, it should not be enough that consumers at Hooters enjoy—and even demonstrate through customer surveys that they enjoy—having the option of buying food in an environment in which sexual excitement is also provided. What *Wilson* establishes is that the sexual subordination of women cannot be used simply to gain competitive advantage. A business must show that its primary purpose is to provide sexual stimulation rather than food, drink, or some other service for which sex is not an essential component. This it has a perfect right to do, although to defend its right to discriminate on the basis of sex, a business will not be able to hide behind the legitimacy of ordinary business purposes the public deems more ‘respectable’—flying passengers, serving food, and so on. Once it attempts to defend its business in nonsexual terms, the BFOQ exception is no longer available to protect sex-specific requirements. The rule of thumb at the end of the day is simple: sex bars may subordinate women, but airlines and restaurants may not.<sup>61</sup>

## 2. Authenticity and BFOQs

The EEOC recognizes sex as a BFOQ “[w]here it is necessary for the purpose of authenticity or genuineness.”<sup>62</sup> To illustrate this point, the EEOC states that an employer who hires an actor or actress may use sex in order to guarantee authenticity of the production.<sup>63</sup> While the authenticity exception is limited, it conceivably offers a defense to an employer who hires entertainers

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two aspects: 1) an emphasis on the individual worker’s development and treatment as a rational actor; and 2) an understanding that women’s self-concepts are fragile. *Id.*

59. While most courts seem to agree with Bartlett that the BFOQ defense does not apply to employers who use sex appeal to sell a product but should protect employers whose business sells sex as its primary mission, Bartlett’s prediction that the sex clubs and other businesses that sell sex primarily would be marginalized by the law, see Bartlett, *supra* note 8, at 2577–78, seems not to have come true. Today, there are more sex clubs than in the past and there is a market for more high-priced, “high-class” establishments. Apart from Las Vegas, strip clubs are thriving across the country. DANIELLE EGAN, *DANCING FOR DOLLARS AND PAYING FOR LOVE: THE RELATIONSHIP BETWEEN EXOTIC DANCERS AND THEIR REGULARS* 9, 11–12 (2006).

60. Hooters is a restaurant chain that advertises the sex appeal of its waitresses who dress in tight midriff-baring shirts and shorts. Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN’S L.J. 163, 191 n.134 (1997). The shirts, which are worn very tight, exhibit two large eyes of an owl over the breasts. *Id.* at 163 n.4. “Hooter” is also a slang term for breast. *Id.* at 295; Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought By a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 295 (1998).

61. Bartlett, *supra* note 8, at 2578–79.

62. 29 C.F.R. § 1604(a)(2) (2003) (alteration added).

63. *Id.*

other than actors if the entertainment is sex-specific. If the entertainment is sexual in nature, but selling sex is not the central core of the employer's business, the BFOQ defense might apply.

For example, the New York Human Rights Appeal Board found that a BFOQ defense applied to the hiring of Playboy bunnies to work in the Playboy Club.<sup>64</sup> The Commissioner of the New York State Division of Human Rights came to the same conclusion.<sup>65</sup> Although it is unclear whether the Board permitted the exclusive hiring of women as Playboy bunnies because the "essence" of the business of the Playboy Club was to sell sex or in order to promote authenticity, the Playboy Club seems to fall in between the example of a strip club whose central mission is to sell sexual entertainment and a theatrical production that hires women to act in the roles of women.

Notwithstanding the decision of the New York Human Rights Appeal Board and the later decision by the Commissioner, a serious argument exists that being a woman is not a BFOQ for the job of Playboy Club bunny. Under the *Johnson Controls* test, using women as "bunnies" may relate to the essence of the business of the Playboy Club if the essence is defined as offering a "club" environment that caters to heterosexual men by emphasizing female sexuality. The essence of the business can be defined more broadly, however, to include serving food and drinks and an opportunity for a primarily male clientele to relax and gamble, rather than selling female sexuality.

Even if the essence is to sell female sexuality, the Playboy Club may have difficulty proving the second part of the *Johnson Controls* test: that being a woman is objectively and verifiably necessary to the performance of the job tasks and responsibilities of the Playboy bunny. If the tasks of a Playboy bunny include serving food and drinks to customers, there is no question that both men and women are capable of performing these job requirements. A good argument can be made that the Playboy Club uses sex appeal to sell other unrelated products, just as Pan Am and Southwest Airlines attempted to do when it hired only women as flight attendants. The Playboy bunny is not selling sex in the same way that a dancer in an exotic dance club is. Rather, the Playboy Club uses her sex appeal to sell other products.

A counterargument would assert that Playboy bunnies are at the very core of the Playboy Club. If the Playboy Club were forced to hire men into these jobs, the men could not perform as bunnies because they lack the feminine sex appeal which is central to the mission of the Playboy Club. Thus, the argument would be threefold: 1) rather than using sex appeal to serve other products, sex appeal is central to the product and the identity of the Playboy Club; 2) the clientele would likely desert the Playboy Club without the female bunnies; and 3) unlike

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64. See *Wilson*, 517 F. Supp. at 301 (citing *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights Appeals Bd., 1971) (dicta); *Weber v. Playboy Club*, Appeal No. 774, Case No. DFS 22619-70 (N.Y. Human Rights Appeals Bd., 1971) (dicta)); *Playboy Club Int'l, Inc. v. Hotel & Rest. Employees & Bartenders Int'l Union*, 321 F. Supp. 704, 704 (S.D.N.Y. 1971) (assuming the legality of the appearance rules for Playboy bunnies).

65. *Aromi v. Playboy Club, Inc. et. al.*, Case No. X-E-ADMS-42884-761 (N.Y. State Div. Human Rights Aug. 1, 1985) (concluding that having the "bunny image" is a BFOQ and stating that it is bound by the *St. Cross* and *Weber* cases), available at <http://njlegallib.rutgers.edu/misc/aromi.pdf>, at 2.

Pan Am and Southwest Airlines, the focus of the Playboy Club is entertainment. In order to accomplish the goal of entertaining its clientele, the Playboy Club must have the freedom to entertain in a manner desired by its male clientele.

This position incorporates both the arguments that being a woman is related to the “essence” of the business and that authenticity requires that women be bunnies. The Playboy Club may argue that a Playboy bunny has a specific feminine identity that customers associate with the organization. If the club were to permit men to serve as bunnies, the image and identity of the Playboy bunny would be altered or destroyed. Because the image and identity are closely linked to the hedonistic pleasures of heterosexual men, women by their very womanhood are exclusively able to serve as Playboy bunnies. If men were hired into the positions as Playboy bunnies, the authentic or genuine identity of the Playboy Club would be altered.

#### IV. APPLYING THE BFOQ DEFENSE TO COCKTAIL SERVERS: LAW AND POLICY IMPLICATIONS

The privacy, sex appeal, and authenticity cases shed light on the analysis that courts should employ in determining whether casinos have a BFOQ defense to Title VII for hiring exclusively women as cocktail servers. From the privacy cases, the casinos are likely to borrow the argument that they will lose profits if they do not offer sexy women in the role of cocktail waitress. Although this argument is sometimes successful in combination with an asserted privacy interest of the customer, alone it would be difficult to make. If, however, this argument were combined with a claim that selling sexy entertainment is the “essence” of the business or that authenticity requires a finding of a BFOQ, it may have some force.

A second argument the casinos will probably make relates to the “essence of the business.” The casinos may argue that the *Pan Am* and *Southwest Airlines* cases are distinguishable because the essence of the business of an airline is the safe transport of passengers. Unlike airlines and other companies that sell a service or product unrelated to sex appeal, casinos provide young, attractive cocktail servers to entertain heterosexual men. The casino owners will analogize their businesses to that of the Playboy Clubs arguing that, like the Playboy bunnies, casino cocktail servers offer entertainment and feminine appeal which is objectively necessary to perform the job responsibilities of taking care of the male customers.

Finally, this argument may combine with the courts’ recognition that a need for authenticity can create a successful BFOQ defense. The casinos are likely to argue that the cocktail servers are similar to actresses who play the role of sexy handmaidens who serve the patrons as they gamble. Moreover, they probably will argue that cocktail servers must meet certain criteria in order to please the customer. The uniforms and dress codes required of cocktail servers reinforce the argument that being a woman with a certain personality and appearance is a BFOQ for the job of cocktail server. These tight-fitting uniforms emphasize the cocktail servers’ youth and sexuality and confirm that the women’s role is to serve the male gambler. Men who come to the casinos step

into a bubble of fantasy. Cocktail waitresses, dressed in sexy uniforms, work to fulfill the fantasy.<sup>66</sup>

The casinos' arguments may or may not prevail. In response, a good argument exists that, unlike exotic dancers in a gentlemen's club, a cocktail server does not engage in sexual repartee or contact with the patrons. The cocktail servers' job is to serve male and female patrons in an efficient and friendly manner. If this definition of job responsibilities prevails, casinos may have difficulty convincing a judge that womanhood is objectively and verifiably necessary to perform the job tasks. In light of this problem, the casinos will probably attempt to define the job in sexual terms or to describe the essence of the business as entertainment. They are likely to maintain that sexy women cocktail servers are part of the entertainment offered to casino clientele.

Under the tests established in *Johnson Controls*, *Diaz*, and *Southwest Airlines*, if the essence of the casino business is defined as providing gaming opportunities to customers, limiting cocktail server positions to sexy young women appears unrelated to this mission. Moreover, even if the central mission is defined more broadly as "sexy entertainment," a definition that would not apply to most casinos unless the casino limits the casino floors to adults, the argument that only women can perform the tasks of the job is weak.

While it is conceivable that a particular casino could build its business around a sexual image and that all casino workers would necessarily further the sexy image, that casino does not exist. Most casinos require a combination of sexy and conservative dress and grooming of its employees. For employees other than cocktail servers, casinos impose uniform dress and grooming requirements that are rather conservative. Conservative hairstyles, nail polish and hair color are required.<sup>67</sup> Men are forbidden from wearing colored nail polish.<sup>68</sup> And, even though the casinos require that cocktail waitresses wear skimpy sexy uniforms, some of the grooming requirements of the cocktail waitresses are quite conservative. For example, the casino regulates the color of the hair and nail polish to present a more conservative uniform image.<sup>69</sup>

Perhaps a more important question is how the courts *should* interpret the law—i.e., whether application of a BFOQ defense furthers Title VII's policies. This discussion is complex because the purposes and policies underlying Title VII point in different directions depending on what values we consider most precious. Arguments against recognizing the BFOQ focus on the dignitary interests of women as a group, including: (1) the subordination of individual women who serve as cocktail waitresses as well as the subordination of women as a group; (2) the possibility that other better jobs would open up to women

66. It is interesting that other casino workers have dress and appearance codes that require the workers to wear conservative clothing, hairstyles and makeup. In a sense the casino cocktail waitress, although she wears what many would consider a racy costume, is considered "classy" in Las Vegas, perhaps a throwback to the old concept of showgirls. See, e.g., Dress, Appearance, and Grooming Codes of the following casinos in Las Vegas: Aladdin, Paris/Bally's, Binion's, Boyd Gaming, Frontier, MGM Grand, Monte Carlo, Palms, Station Casinos, Venetian (on file with author).

67. *Id.*

68. *Id.*

69. Interviews with former cocktail servers, in Las Vegas, Nev. (May 26 and 27, 2005; May 17, 2006); interview with bar back, in Las Vegas, Nev. (June 16, 2006).

cocktail waitresses if the BFOQ does not exist; and (3) the rights of individual men who would be hired to serve cocktails if they were permitted to do so. Arguments in favor of recognizing a BFOQ would emphasize: (1) the individual woman's right to sell her sex appeal for economic gain; (2) the woman and her family's economic interests; and (3) the rights of casino owners to define their businesses.

#### A. Interests Opposing a BFOQ Defense

Professor Yuracko approves of the courts' reluctance to find sex as a BFOQ in cases such as *Pan Am* and *Southwest Airlines*.<sup>70</sup> Although she believes that the "essence of the business" test does not explain the line drawing between businesses that sell sex appeal and businesses that sell sex, she believes that the courts' jurisprudence reflects a type of perfectionism.<sup>71</sup> She argues that recognizing a BFOQ defense to hire women as sexual titillation may impede the progress of women as a group in achieving their full intellectual potential.<sup>72</sup> Citing a study that demonstrates that dressing women in sexy apparel impairs their intellectual functioning, Yuracko opines that women will flourish if employers emphasize intellectual abilities rather than sexual attraction.<sup>73</sup>

Similarly, Dean Bartlett argues for limiting the BFOQ defense to very narrow circumstances. She believes that by being viewed as sex symbols women are subordinated and that the law should not approve of the subordination by permitting businesses to sell their products through the use of female sex appeal.<sup>74</sup> Consequently, she would limit the BFOQ defense to legal businesses that directly sell sex.<sup>75</sup> According to these views, a decision refusing to extend the BFOQ defense to cover the exclusive hiring of women in casinos would reduce the stigmatization of women as sex symbols and encourage women to flourish through emphasis of their intellectual capacities.

Defining the cocktail server job as sexualized subordinates women as a group. Women in general would have greater dignity if courts decided not to sanction the casinos' subjugation of women through the exclusive hiring of sexy women as cocktail waitresses. Sanctioning the BFOQ defense would not only subordinate women cocktail servers as a group, but may also lead to more aggressive use of the defense.<sup>76</sup> What would prevent employers from defining their product or services as particularly feminine or masculine? A law firm could argue that it hires only men who are aggressive litigators because the clients prefer male lawyers. Schools could hire only women as teachers because women are arguably more child-oriented or because the parents prefer female teachers. The law should not reinforce sexual subjugation of women or rely on stereotyping to determine which jobs are feminine and masculine.

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70. See Yuracko, *supra* note 46, at 212–13.

71. *Id.* at 172–79.

72. *Id.* at 210.

73. *Id.* at 208–09, 210–12.

74. See Bartlett, *supra* note 8, at 2576.

75. *Id.* at 2575.

76. See, e.g., Yuracko, *supra* note 46, at 201 for an articulation of this argument.



## B. Interests Favoring a BFOQ Defense

On the other hand, some women view commodification as a means to an end.<sup>77</sup> These women may prefer the power to decide to sell their sexuality as a commodity. There is increasing commodification of personal services and many feminists argue that commodification is not always a bad thing.<sup>78</sup> Las Vegas casinos offer good jobs to women cocktail waitresses. Many of these women use these jobs to raise families or to put themselves through university or graduate school. These jobs, which have flexible hours and are well-paid, can give women the freedom to pursue opportunities that allow them to develop their intellectual abilities and flourish.<sup>79</sup>

Moreover, within certain limits imposed by Title VII, business owners have the right to define their own businesses. Casinos use the cocktail servers as “eye candy” to attract visitors to the casino and to keep patrons happy and gambling. The casinos’ exclusive hiring of women as cocktail servers, and the dressing of women cocktail servers in sexy attire, distinguishes the Nevada casinos from other gaming establishments. In Nevada, for instance, it is possible to play slot machines in grocery stores that do not have sexy women serving cocktails. In fact, the women—and it usually is women—who work in the supermarkets in Las Vegas in the slot machine section are almost always senior citizens. Moreover, in Nevada, gaming in the form of video poker exists in a number of bar/restaurant establishments that do not limit their cocktail servers to young women dressed in skimpy outfits. Outside of Nevada, casinos operated by Indian tribes or on riverboats in the Mississippi have a different atmosphere. Consequently, Nevada casino owners have a legitimate argument that their establishments are unique: they offer gaming in a “classier,” more sexualized environment.

## C. Choosing Which Set of Interests to Protect

The above arguments raise legitimate questions concerning which interpretation of the BFOQ defense would better further the policies of Title VII. Because the casinos would have difficulty proving that being a sexy woman is a BFOQ under the test articulated in *Johnson Controls* and because there are strong policy arguments in favor of not expanding the use of the BFOQ in this situation, casinos should not be able to justify a BFOQ defense. Perhaps the best reason for refusing to recognize a BFOQ defense is that job segregation leads to

77. “Commodification” includes the selling of one’s sex or sex appeal for money. See generally RETHINKING COMMODIFICATION (Martha M. Ertman & Joan C. Williams, eds., 2005).

78. See, e.g., Martha C. Nussbaum, *Taking Money for Bodily Services*, in RETHINKING COMMODIFICATION, *supra* note 77, at 243 (arguing that many professionals sell their services for money); Ann Lucas, *The Currency of Sex: Prostitution, Law and Commodification*, in RETHINKING COMMODIFICATION, *supra* note 77, at 255 (arguing that like wisdom sold by an expert, sex is not used up or diminished by sales). See also McGinley, *supra* note 24, at 95 n.188.

79. A number of law students at Boyd School of Law work their way through school as cocktail servers or have been cocktail servers in the past. Interviews of law students who were former cocktail waitresses or who worked as waitresses during law school, in Las Vegas, Nev. (May 26 and 27, 2005) (on file with the author).

job stratification, lower salaries, and sexual harassment of women.<sup>80</sup> While women serve as cocktail servers, men fill the jobs of casino hosts. The host jobs, which are highly coveted, are better paid and more respected than the jobs of cocktail server.<sup>81</sup> A decision not to permit the BFOQ defense for cocktail server positions may create jobs for men in those positions and simultaneously open up jobs for women as casino hosts. Given the harms of job segregation, deciding that womanhood is not a BFOQ for the job of cocktail server does little relative harm to casino employers. While it imposes some limits on the casino, it does not significantly intrude upon the owner's ability to direct his or her business. The casino's primary business is gaming, not sexual entertainment. There is no evidence that the casino business would fail if the cocktail servers were both men and women.

More importantly, the real harm to women cocktail servers does not necessarily result from the sexualization of women on the job. The injury results from the different roles assigned to men and women, both to employees and customers. The men customers play the role of sexual aggressors while the women cocktail servers play the role of sexual beings whose purpose is to serve the men. This stereotyping reinforces the traditional notion of the separate spheres of men and women—men as rational beings who still have the authority to engage in sexual predation and women as nothing other than emotionally driven, sexual objects.<sup>82</sup> In the traditional workplace, even though male sexuality existed, it was invisible because it was the norm.<sup>83</sup> Many jobs held by women stress physical attractiveness.<sup>84</sup> When a job has a sexual component, people assume that there are few other qualifications needed for the job.<sup>85</sup> While women's jobs often have a sexual component, men are not viewed as inherently sexual at work.<sup>86</sup> A workplace that intentionally sexualizes men would challenge the traditional notion that women are sexual objects and men are rational beings who are driven to express their sexual urges because of women's behavior. If such a workplace existed, it would jar the senses and clarify the aspect of performance involved in this sexualization. Since the job of cocktail server requires submissiveness and servility, having men serve cocktails would demonstrate that men can also play the role of submissive servant, a contradiction to ordinary gender roles.<sup>87</sup>

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80. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2066, 2140 (2003) (demonstrating that workers are more likely to be harassed where job segregation occurs).

81. Interview of former cocktail server, in Las Vegas, Nev. (May 17, 2006) (on file with the author).

82. See Christine L. Williams & Dana M. Britton, *Sexuality and Work*, in INTRODUCTION TO SOCIAL PROBLEMS 1, 3 (Craig Calhoun & George Ritzer eds., McGraw-Hill Primis 1995) (explaining that Max Weber assigned men to the public sphere, which includes work and organizations and women to the private sphere, which includes family and sexuality).

83. *Id.* at 8.

84. *Id.*

85. *Id.* (describing research by sociologist Barbara Gutek).

86. *Id.*

87. Casinos hiring men as cocktail servers will have to be extremely careful that they do not disproportionately hire men of color. Such a hiring pattern could lead to pernicious results—promotion of the idea that women and men of color need to be submissive to white men.

Casino operators should be given two choices: (1) de-sexualize the job of cocktail server and hire both men and women or (2) keep the sexual component of the job, hire both men and women, and dress them in equally sexy outfits. If both men and women are treated as sexual beings, invisible male sexuality will become more visible and the jobs will likely subjugate women less. Customers will view both men and women through the sexual lens. This treatment will offer men jobs as sexy workers and will challenge the assumption that it is a woman's role alone to serve as a sexual object. A decision refusing the BFOQ defense while simultaneously permitting employers to dress men and women cocktail servers in sexually provocative clothing reaches the proper balance between the rights of both men and women and the interests of employers.

#### V. COCKTAIL SERVER'S DRESS AND GROOMING REQUIREMENTS AFTER *JESPERSEN*

When faced with a Title VII challenge to dress or appearance codes that differentiate between men and women, courts employ a number of different tests, but no court has held that differences in dress codes for men and women constitute facial discrimination under Title VII. A few courts conclude that, because dress and appearance codes apply to mutable characteristics within the employee's control, the codes are permissible.<sup>88</sup> Other courts hold that dress codes make such a minimal incursion into a person's rights that they are permissible if reasonable.<sup>89</sup> The majority of courts permit sex-differentiated dress and appearance codes if the burdens on women and men are relatively equal;<sup>90</sup>

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88. See, e.g., *Willingham v. Macon Tele. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (holding that Title VII did not prohibit discrimination based on mutable characteristics); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974) (regulating men's hair length did not violate Title VII because it was not an immutable characteristic). The trial court in *Jespersen* adopted the mutable characteristic argument as an alternative holding. See *Jespersen*, 280 F. Supp. 2d at 1192.

89. See, e.g., *Wiseley v. Harrah's Entm't Inc.*, 94 Fair Emp. Prac. Cas. (BNA) 402 (D.N.J. 2004) (concluding that grooming policies fall outside of the purview of Title VII).

90. While most courts use the equal burdens test, Bartlett argues that courts' attempts to weigh the burdens have led to poor results. Bartlett argues that it is impossible to disregard and transcend community norms, see Bartlett, *supra* note 8, at 2568, and she proposes that courts use community norms in a more self-conscious way to determine which norms impose burdens "that disadvantage members of one sex in relation to the other," *id.* at 2569. She proposes that courts require employers using dress codes that confer a disadvantage on one group to justify the codes by proving that they are a BFOQ. *Id.* at 2572. In this case, where there are both men and women in the job, the BFOQ defense would require that the dress or appearance code be necessary to the essence of the employer's business. *Id.* at 2578. According to Bartlett, once the BFOQ defense is applicable, the community norms "constitute the context within which the employer must establish whether its discriminatory rule is necessary to its essential business purpose." *Id.* at 2573. Thus, a BFOQ defense would not justify the exclusive hiring of women (or sexy women) as stewardesses or waitresses in order to attract men customers because the primary business of an airline or restaurant is not to sell sex, but to transport passengers or feed customers. *Id.* at 2573-75. In contrast, in the businesses whose primary purpose is to offer sex as a commodity for sale the employer could prevail by posing the BFOQ defense. *Id.* at 2576-77. Bartlett reasons that, although these workplaces subordinate women as sexual objects, the combination of the law's pressure in narrowing the BFOQ defense and community norms that impose limits on the types of businesses that employers are willing to defend would marginalize businesses that sell female sex. See *id.* at 2577-78. The underlying premise of Bartlett's recommendation is that strip clubs subordinate women dancers, as would other employers if they were permitted to require sex appeal for jobs that sell unrelated services and goods. Since Bartlett's article, however, there has emerged feminist scholarship that would refute this premise.

however, if the burdens on one sex outweigh those on another sex, courts find that the dress or appearance code violates Title VII.<sup>91</sup>

*Jespersen v. Harrah's Operating Co.*,<sup>92</sup> added an interesting twist to the jurisprudence. Darlene Jespersen performed successfully as a bartender at Harrah's Casino in Reno, Nevada, for almost twenty-one years.<sup>93</sup> She had a loyal following of regular customers who bought drinks at her bar.<sup>94</sup> When Harrah's encouraged its female bartenders to wear makeup during the 1980s and 1990s, Jespersen found that wearing makeup made her feel "sick, degraded, exposed and violated;" she felt "'dolled up,'" like a sex object, stripped of her dignity, and less effective at work.<sup>95</sup>

In February 2000, the defendant instituted the "'Beverage Department Image Transformation'" program.<sup>96</sup> The purpose was to create a "'brand standard of excellence.'"<sup>97</sup> The "Personal Best" program, as Harrah's described it, included general appearance standards applicable to all employees and particular sex-specific appearance standards.<sup>98</sup> The standards required that

See KATHERINE FRANK, G-STRINGS, AND SYMPATHY: STRIP CLUB REGULARS AND MALE DESIRE (2002); DANIELLE EGAN, DANCING FOR DOLLARS AND PAYING FOR LOVE: THE RELATIONSHIP BETWEEN EXOTIC DANCERS AND THEIR REGULARS (2006) (arguing that it is empowering, not subordinating, for women to dance in strip clubs).

91. See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (holding that it is disparate treatment to require women to keep their maximum weight to those prescribed on weight table for women of medium build while requiring men to maintain a maximum weight on a weight table for men of large build).

92. 444 F.3d 1104 (9th Cir. 2006) (en banc).

93. *Jespersen*, 280 F. Supp. 2d at 1190 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *reh'g en banc granted*, 409 F.3d 1061 (9th Cir. 2005), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd*, 444 F.3d 1104 (9th Cir. 2005).

94. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004), *reh'g en banc granted*, 409 F.3d 1061 (9th Cir., 2005), *and vacated*, 409 F.3d 1061 (9th Cir. 2005).

95. *Id.*

96. *Id.*

97. *Id.*

98. The standards state:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

\* \* \*

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

- Overall Guidelines (applied equally to male/ female):
  - Appearance: Must maintain Personal Best image portrayed at time of hire.
  - Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
  - No faddish hairstyles or unnatural colors are permitted.
- Males:
  - Hair must not extend below top of shirt collar. Ponytails are prohibited.
  - Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.

women's hair be styled, teased, or curled, and that men's hair be short.<sup>99</sup> This standard forbade men from wearing makeup and colored nail polish, but did not initially require women to wear makeup.<sup>100</sup> Eventually, Harrah's amended the standard to require women to wear makeup.<sup>101</sup>

Harrah's also instituted "Personal Best" training for its employees.<sup>102</sup> Once the professional trainers completed the training, they photographed each employee and placed the photos into the employees' files. Supervisory employees used these photographs to judge whether each employee complied with the standards every day.<sup>103</sup> Jespersen refused to wear makeup and Harrah's fired her.<sup>104</sup> She sued, alleging sex discrimination in violation of Title VII of the 1964 Civil Rights Act.<sup>105</sup> The federal district court granted Harrah's motion for summary judgment.<sup>106</sup> The court concluded that the policy did not impose greater burdens on women than on men,<sup>107</sup> that "the makeup requirement involves a mutable characteristic, which does not infringe on equal employment opportunities due to one's sex";<sup>108</sup> and, finally, that the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, which held that discrimination because of a woman's failure to conform to sex stereotypes is prohibited by Title VII,<sup>109</sup> does not support a cause of action for discriminatory dress and appearance codes.<sup>110</sup> The court did not reach the question of whether the makeup requirement was a BFOQ.<sup>111</sup>

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- Eye and facial makeup is not permitted.
  - Shoes will be solid black leather or leather type with rubber (non skid) soles.
  - Females:
    - Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
    - Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
    - Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
    - Shoes will be solid black leather or leather type with rubber (non skid) soles.
    - *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary [sic] colors. Lip color must be worn at all times. (emphasis added).*

*Jespersen*, 444 F.3d at 1107 (emphasis added by court).

99. *Id.*

100. *Jespersen*, 392 F.3d at 1077–78 (9th Cir. 2004).

101. *Id.* at 1078, n.2. The amended policy stated: "make up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "lip color must be worn at all times." *Id.*

102. *Id.* at 1078.

103. *Id.*

104. *Jespersen*, 280 F. Supp. 2d at 1190.

105. *Id.*

106. *Id.* at 1196.

107. *Id.* at 1193.

108. *Id.*

109. 490 U.S. 228 (1989) (holding that sex stereotyping is evidence of illegal sex discrimination).

110. *Jespersen*, 280 F. Supp. 2d at 1193.

111. *Id.* at 1194.

On appeal, a three judge panel of the Ninth Circuit affirmed the lower court's decision with one dissent.<sup>112</sup> In a rehearing en banc, the Ninth Circuit once again affirmed,<sup>113</sup> over two vigorous dissents by Judges Pregerson and Kozinski.<sup>114</sup> The majority agreed that the proper test in a dress and appearance policy case is whether the policy imposes unequal burdens on men and women. According to the majority, Jespersen's testimony that she found the makeup requirement burdensome was merely her subjective response to the policy and did not establish that the policy's burdens were unequal.<sup>115</sup> The majority looked at the entire appearance standard and concluded that there was insufficient evidence in the record to prove a greater burden on women. The court left open the possibility that, in a future case, a plaintiff could prove that the policy imposed unequal burdens on women and men.<sup>116</sup>

Perhaps more important to the dress codes of cocktail servers in Nevada casinos, the court held that future plaintiffs may potentially employ the *Price Waterhouse* sex stereotyping theory to attack a dress code that intentionally stereotypes a person because of sex.<sup>117</sup> The majority concluded, however, that Harrah's dress code did not stereotype women because of their sex and that there was no evidence that the dress code was motivated by an interest in treating women as sex objects.<sup>118</sup> In reaching this conclusion, the majority noted that the makeup requirement did not objectively interfere with a woman's ability to perform the job as bartender.<sup>119</sup> The court also noted that the dress code required of men and women bartenders was mostly unisex.<sup>120</sup> The uniform included non-skid black shoes, and it fully covered the bodies of both men and women; there was no intention to make the women's uniform sexually

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112. *Jespersen*, 392 F.3d at 1076. The two judge majority concluded that the test in the Ninth Circuit is the "unequal burdens" test. It held that the proper measure was the entire appearance standard as applicable to men and women rather than the makeup requirement alone and noted that the plaintiff had not placed into the record any evidence demonstrating that there was a heavier burden imposed on women than on men employees. *Id.* at 1081. In contravention of the district court judge's decision, the two judge majority noted that even if there is a mutable characteristic and there is an unequal burden placed on women than on men, the employer would be required to prove that the sex-differentiated requirement was a BFOQ. *Id.* at 1080. The majority also declined to apply *Price Waterhouse* to a dress code case. *Id.* at 1082–83. The dissent argued that the plaintiff presented a question of material fact as to whether the employer's appearance standards placed a heavier burden on women. *Id.* at 1085 (Thomas, J., dissenting). The dissent pointed out that the plaintiff presented a question of material fact under the *Price Waterhouse* sex stereotyping doctrine because makeup historically has been used as a tool of subordination of women. *Id.* at 1083–84. The dissenting judge disputed the approach taken by the majority. In determining whether unequal burdens existed, the dissent would have compared the requirement that women wear makeup against the prohibition against men's wearing of makeup, rather than considering the entire appearance code and its overall burdens on men and women respectively. *Id.* at 1085–86.

113. 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc).

114. Of the eleven judges voting, seven were in the majority and four dissented. *Id.* at 1104.

115. *See id.* at 1110–11.

116. *See id.*

117. *Id.* at 1113.

118. *Id.* at 1112.

119. *Id.* at 1112.

120. *Id.*

provocative.<sup>121</sup> Moreover, this was not a case of sexual harassment because of the plaintiff's failure to conform to feminine norms of dress or behavior.<sup>122</sup> According to the court, Jespersen's evidence, which showed her subjective revulsion to the makeup requirement, did not establish that Harrah's intended to sex stereotype women in general by imposing the makeup requirement.<sup>123</sup> Thus, the definition and evolution of the law of sex stereotyping and dress and appearance codes are left open to future lawsuits.<sup>124</sup>

After *Jespersen's* clarification that a cause of action under *Price Waterhouse* may exist if employers impose dress or appearance codes intentionally to stereotype employees because of their sex, an employer who hires exclusively men or women and dresses them in sexy, sex-stereotyping uniforms will likely have to prove that the dress code is a BFOQ in order to escape liability under Title VII. There can be little debate that current dress and appearance codes for cocktail servers intentionally stereotype women employees because of their sex. The uniforms are low cut, skimpy, and very sexy. This article has argued that being a sexy woman should not be a BFOQ for a cocktail server job in a Las Vegas casino or similar establishment. Casino employers, therefore, must give equal employment opportunities to men and women applying for jobs as cocktail servers. Moreover, if the casinos have a reputation of hiring only women to fill these jobs, they are potentially liable for a failure to hire men even if they receive few or no applications from men.<sup>125</sup> A perception of gender bias and sexualization of women may in fact have created a disincentive for men to apply for the positions. Casinos, therefore, should make affirmative efforts to recruit and hire men as cocktail servers to countermand the persistent, historical practice of hiring only women to serve cocktails.<sup>126</sup>

121. *Id.* The court distinguished *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 610–11 (S.D.N.Y. 1981) (holding a cause of action existed under Title VII where the employer forced the female lobby attendant to wear a sexually provocative outfit that subjected her to customer harassment).

122. *Id.* at 1113. The court distinguished both *Rene v. MGM Grant Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (concluding that a cause of action under Title VII existed where a man is sexually harassed because he does not conform to the sexual stereotypes of masculinity), and *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that a cause of action under *Price Waterhouse* existed because the plaintiff, a male waiter, was harassed for his feminine mannerisms).

123. *Id.*

124. *Id.*

125. See *Bazemore v. Friday*, 478 U.S. 385, 386–87 (1986) (sanctioning use of multiple regression analysis to prove employment discrimination); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339–40 n.20 (1977) (stating statistics can be used to prove a pattern and practice of discrimination). Compare *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308–09 (1977) (recommending courts use a comparison between the racial composition of persons holding jobs in the defendant's workforce with the racial composition of the qualified individuals in the relevant labor market), with *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1279–80 (11th Cir. 2000) (assuming it was proper for the lower court to compare the number of women in the job with those in the labor pool rather than with those who applied for the jobs because there was evidence that women did not apply for the jobs as a result of the history of discrimination).

126. Efforts to hire men into jobs that are exclusively held by women are permissible under Title VII so long as sex is only one factor considered in the decision to hire a man cocktail server. See *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987) (upholding a voluntary affirmative action plan that took sex as one of several factors into account in evaluating qualified applicants for the job).

Once the casinos hire men to serve cocktails, *Jespersen* raises the additional question of what dress codes and appearance standards would be permissible for cocktail servers. For example, may casinos impose sex-specific dress codes on men and women cocktail servers that stereotype them because of sex? *Jespersen* is subject to multiple interpretations, and the court has left open the possibility that future cases will define the law of dress and appearance codes and sex stereotyping.<sup>127</sup>

First, *Jespersen* may preclude all dress and appearance codes that sexually stereotype men or women—or both—in a sexually provocative manner. If *Jespersen* is interpreted this way, casinos would violate Title VII either by imposing different sex-specific sexually provocative uniforms on men and women, or by imposing the same sexually provocative uniform, on both men and women. In other words, *Jespersen* could stand for the proposition that requiring sexy dressing of employees is prohibited unless the employer establishes a BFOQ. In response to dissenting Judge Pregerson's criticism that the unequal burden test permits sex stereotyping of both sexes, the majority implies that even if applied equally, dress codes that sex stereotype both sexes may not be permissible under *Price Waterhouse*.<sup>128</sup> This interpretation would likely apply to industries other than entertainment and to jobs that do not require the employee to engage in a performance. Thus, a law firm would not be permitted to require both its male and female associates to dress in sexy garb. If this interpretation applied to casinos and similar establishments, it would also eliminate costumes that are sexually provocative from the casino floors. Like the bartenders in *Jespersen*, cocktail servers would dress in unisex uniforms except for certain grooming standards that do not objectively interfere with employees' ability to work. While this result would eliminate the obvious sexual subrogation of women in casino dress codes, it would continue to reinforce established cultural norms concerning what grooming standards "objectively" impede an individual's ability to work. Thus, while the interpretation eliminates the sexualizing of women as a class, it does not protect the autonomy of individuals who find the imposition of cultural norms oppressive.<sup>129</sup>

Moreover, casino owners would find this requirement a drab and colorless imposition on the "bubble of fantasy" that they are attempting to create. Las Vegas casinos would argue that they exist because human beings need an escape from the rigid rules imposed on them in their "real" lives. Furthermore, at least some women cocktail servers welcome the opportunity to wear the flesh-exposing uniforms because they can earn substantially more in tips. There is, no doubt, an element of performance in the job of casino cocktail waitress that is lacking in the job of waitress in a greasy spoon restaurant.

A second possible interpretation of *Jespersen* is that it forbids the use of gender-bending dress and appearance codes. In other words, because Harrah's makeup requirement is consistent with cultural norms and reinforces expected gendered grooming, it will not objectively inhibit a woman or a man's ability to

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127. 444 F.3d at 1112.

128. *Id.*

129. See generally Catherine L. Fisk, *supra* note 15, for a detailed discussion of employee autonomy and dress codes.



do the job. A code that requires short cropped hair on women and curled hair and makeup on men, however, may objectively inhibit the employee's ability to do the job and is therefore illegal. While Las Vegas sees itself as very free sexually, it actually projects a free heterosexual image, by suppressing a homosexual image.<sup>130</sup> It flaunts its heterosexual identification through a commodified, sexualized view of women, but avoids the reality of homosexuality.<sup>131</sup> At least insofar as the casinos are concerned, "desire Las Vegas style" means heterosexual men's desire for women.<sup>132</sup> A reading of *Jespersen* that prohibits gender-bending dress codes would reinforce these one-sided norms, which emphasize sexy young women as objects of heterosexual desire. A gender-bending dress code in Las Vegas may actually do more to challenge traditional notions of a woman as a sex object than unisex dressing.

Another interpretation of *Jespersen* would prohibit dress and grooming codes that are sufficiently sexually provocative to create an opportunity for customers to harass employees because of sex. This interpretation may also be too restrictive. While casinos should be liable for sexual harassment of cocktail servers by customers that casinos negligently permit to occur,<sup>133</sup> casinos should be permitted to define the cocktail server's job as part-performance even though being a woman is not a BFOQ for the job. The sexually provocative dress code, imposed equally on men and women, may enhance the performance.

A preferable reading of *Jespersen* would permit casinos and other industries that provide entertainment to adopt sexually provocative dress requirements for both men and women cocktail servers, as long as the codes treat both men and women as sexual subjects. Because men are not ordinarily considered sexual objects, the dressing of male cocktail waiters in sexually explicit uniforms would create a reaction of surprise and humor,<sup>134</sup> emphasizing that the job of cocktail server entails a performance and the server's uniform enhances the ability of the server to perform. This reaction makes the viewer more aware of the sexual commodification of women that surrounds us. It serves as a playful reminder of the viewer's acceptance of the woman's role as a sexual temptress and the man's role as an aggressor, and challenges, rather than reinforces, sexual stereotypes without unduly restricting the freedom of employers.<sup>135</sup>

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130. See Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, 5 NEV. L.J. 260, 261 (2004).

131. See *id.*

132. There has been minimal incursion into this "old fashioned" concept in Las Vegas. Two shows demonstrating men as "beefcake"—"Chippendales" and the "Thunder from Down Under"—are advertised to appeal to heterosexual women consumers. The Cirque du Soleil has a show entitled "Zumanity" that features homosexual as well as heterosexual couples engaging in erotic behavior. These three shows stand out among a plethora of shows exhibiting female sexuality.

133. See generally McGinley, *supra* note 18; McGinley, *supra* note 24.

134. On a personal note, I experienced a similar reaction upon entering a casino that has men performers dressed as "beefcake." The men were dressed in slacks and a bow tie, but no shirt. The men selected for the performance had had their body hair waxed and were extremely muscular. My reaction, frankly, was surprise and some discomfort. The men who bared their chests appeared almost more naked to me than the women cocktail servers who wore very skimpy costumes.

135. There is a potential challenge to this proposal by an older worker who is considered not sufficiently sexy for the job. The older worker could conceivably allege that the casino's requirement that a cocktail server be "sexy" and wear a sexy uniform has a disparate impact on men and women

To achieve the goal of challenging sexual stereotypes, casinos should consider the effect that the proposed uniforms would have on men and women. For example, sexy costumes should not denote a power differential between men and women. Because men are stereotypically considered sexy when powerful, it would not suffice to put men in suits and women in skimpy outfits. Rather, in order to challenge the concept of women exclusively as sex objects, casino employers must also dress men in uniforms that portray them as sex objects. Moreover, the same uniform on both men and women would often impose unequal effects because of cultural norms about which parts of men's and women's exposed bodies, respectively, are considered erotic. Casinos should avoid dress requirements on men and women that might be humiliating to one group because of social norms, but not bothersome to the other. For example, a decision to go without a shirt would eroticize and humiliate women more than men. A requirement that both men and women shave their heads would, likewise, impose a heavier burden on women than on men.

Casinos should also ensure relative comfort of uniforms for men and women. Requiring high heels for women and flat shoes for men, for example, would impose a heavier burden on women because of the discomfort and difficulty of serving cocktails in high heels, even though high heels may be "gender appropriate" for women according to community norms.<sup>136</sup>

## VI. CONCLUSION

Employers who use sex appeal to entertain their customers should have the right to do so. That right, however, should not extend to the selling of female sexuality without the selling of its male counterpart. A fair reading of Title VII permits an extremely narrow BFOQ defense where the very womanhood or manhood is essential to perform the job tasks. Interpreting the BFOQ defense very narrowly is consistent with the purposes and policies of the Act and will limit the spread of job segregation by sex. Because both women and men can easily perform the tasks and responsibilities of a cocktail server in a Las Vegas

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because of their age. See *Smith v. City of Jackson* (Miss.), 544 U.S. 228 (2005) (holding that there is a disparate impact cause of action under the Age Discrimination in Employment Act, but concluding that it is narrower than a disparate impact cause of action under Title VII because it is limited by the "reasonable factor other than age" clause of the ADEA and because the 1991 Civil Rights Act does not apply to the ADEA). First, I would encourage casinos to avoid disparate treatment causes of action under the ADEA by not automatically excluding older cocktail servers because of their age. Second, to the extent that the casino's definition of sexy follows social norms, the sexy requirement may have an adverse impact on older workers. I recommend that casinos hire older workers who are attractive and fit to serve as cocktail servers. These requirements may well be considered reasonable by the courts, and therefore, justifications for a disparate impact. By the same token, the casinos should realize that social norms do not reflect the broad spectrum of sexual desire and that older workers may be considered sexy by some or many customers. Finally, the inclusion of older workers in sexy costumes would, like the inclusion of men, challenge the notion that only young women are appropriate objects of desire.

136. It is unclear how these standards should treat a makeup requirement for women and a prohibition for men. So long as the men are required to wear a uniform that is equally subjugating, such a differential may pass muster. For a fascinating history of the social meaning of makeup, see Devon Carbado, Muti Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* (Joel Wm. Friedman, ed., 2006).

casino, the BFOQ defense should not protect the casino employer who hires women exclusively as cocktail servers.

One solution to the problem of subordination is to require businesses wishing to exploit female sexuality also to exploit male sexuality. While the cocktail servers, both men and women, could be required to wear sexually suggestive clothing, the presence of men in these jobs would challenge the idea of women as sexually submissive servers. This approach would help overcome the identification of women as sexual objects. In fact, men would also be objectified, but their objectification would make customers more aware of the objectification of women. Furthermore, this solution permits women cocktail servers to continue to work in casino cocktail server jobs while simultaneously breaking down job segregation and opening up other jobs that have previously been unavailable to women. Permitting men to serve cocktails creates opportunities for men to participate in good jobs that are currently held exclusively by women. Finally, this proposal does not unduly encroach upon the employer's prerogatives. It presents a choice to employers of either using a unisex image for its cocktail servers or of hiring both men and women and dressing them in equally sexy attire.